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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 215

WILLIS K. BAKER, JR., and
MERVIN "BUD" CORNELSEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

GEORGE T. DAVIS,
745 Market Street,
San Francisco, California 94103,
Attorney for Petitioners.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners Willis K. Baker, Jr., and Mervin Cornelsen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which was rendered and entered April 4, 1968, and which affirmed their convictions; and to review the judgment of said court rendered and entered May 21, 1968, which denied their petition for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix E annexed hereto.

JURISDICTION

On June 3, 1966, in No. 4269-ND in the District Court of the United States for the Eastern District of California, a jury found both petitioners Willis K. Baker and Mervin Cornelsen guilty under Count I of an indictment of conspiracy to violate 18 U.S.C. Section 641 (conspiracy to receive stolen United States property);[1] and also found petitioner Baker guilty, under Count III of violation of 18 U.S.C. Section 641 (receiving stolen United States property). Petitioners were sentenced July 5, 1966. The United States Court of Appeals for the Ninth Circuit rendered and entered its judgment affirming the convictions on April 4, 1968. (Appendix A). Their petition for rehearing[2] was denied by judgment rendered and entered therein on May 21, 1968. (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). (Appendix C).

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[1]Violation of 18 U.S.C. Section 371, but harmlessly mislabeled in the indictment as violation of 18 U.S.C. Section 641.

[2]Duly filed May 3, 1968.

QUESTIONS PRESENTED

The questions presented for review are:

(1) Is scienter (knowledge that the property received had been stolen from the United States), an essential element of the federal crimes of conspiracy to receive,[3] and receiving,[4] stolen United States property?

(2) Does the following anti-reasonable doubt instruction constitute plain error?

> "There is nothing different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them."

(3) When a co-defendant pleads guilty and becomes a probation seeker, and in the meantime he is to be the chief prosecution witness against the remaining co-defendants,

(a) Does Fifth Amendment due process require reasonable postponement of the trial of remaining defendants until after the trial court decides such probation application, in order to prune the inducement to testify falsely which has become inherent in the situation?

(b) Does Fifth Amendment due process, and the Sixth Amendment witness confrontation clause, prohibit deliberate disclosure to the jury, by the prosecution, that such prosecution witness

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[3] 18 U.S.C. Section 371, conspiracy to violate 18 U.S.C. Section 641.

[4] 18 U.S.C. Section 641.

is a co-defendant who pleaded guilty to the identical conspiracy accusation?

(c) Otherwise, in such situation, does needless postponement of the probation hearing until after the trial of remaining co-defendants, and deliberate disclosure to the jury of the co-conspirator's guilty plea, constitute plain error?

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are as follows:

(1) The Court of Appeals' decision was, in effect, that scienter (knowledge that the property had been stolen from the United States), is *not* an element of the crimes of conspiracy to violate, and violation of, 18 U.S.C. Section 641.

(a) Such decision of that federal question is in direct conflict with applicable decisions of this court, *Morissette v. United States,* 342 U.S. 246;[5] and *Kirby v. United States,* 174 U.S. 47, at 53 and 64:[6]

> ". . . (I)t was incumbent upon the government, to establish its charge against Kirby, to establish beyond reasonable doubt: . . . (3) that he received or retained it with knowledge that it had been stolen from the United States."
>
> ". . . If the stamps were in fact stolen from the United States, and if they were received by the

[5]Theft and conversion of United States property, 18 Stats. at L. 479, Chap. 144, now 18 U.S.C. Section 641.

[6]Receiving stolen United States property, 18 U.S.C. Section 641.

> accused . . . with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged . . ."

(b) Such decision of that federal question is in direct conflict with the decision of other courts of appeals on the same matter, as follows:

Receiving Offense: Cohn v. United States (2d Cir.), 258 Fed. 355, at 358;[7] *Souza v. United States* (9th Cir.), 304 Fed.(2d) 274, 276-277;[8]

Conspiracy-to-Receive Offense: United States v. Sherman (2d Cir.), 171 Fed.(2d) 619, 623-624;[9] *United States v. Crimmins,* (2d Cir.), 123 Fed.(2d) 271, at 272 and 273;[10] *Linde v. United States* (8th Cir.), 13 Fed.(2d) 59, 61[11];

Receiving, and Conspiracy-to-Receive Offenses: Davidson v. United States (2d Cir.), 61 Fed.(2d) 250, at 253-256;[12] *Tomley v. United States* (5th Cir.), 250 Fed.(2d) 549, 553.[13] As to the Seventh Circuit, see

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[7]Receiving stolen United States property, 18 Stats. at L. 479, Chap. 144.

[8]Sale of stolen United States property, 18 U.S.C. Section 641.

[9]Conspiracy to conceal goods stolen from foreign commerce.

[10]Conspiracy to transport securities stolen from interstate commerce, 18 U.S.C. Section 415.

[11]Conspiracy to receive autos stolen and transported in interstate commerce, National Motor Theft Act.

[12]Receiving, and conspiracy to receive, auto stolen and transported in interstate commerce, National Motor Theft Act.

[13]Receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

LaBuy, *Manual of Jury Instructions in Federal Criminal Cases,* 1965, page 263. (Appendix D).[14]

and

(c) Such decision of the Ninth Circuit is upon an important question of federal law which has not, but should be, settled by this Court, in that the federal courts of appeal are presently in utter conflict, in that:

Some federal cases hold that in substantive receiving cases the prosecution must prove knowledge that the stolen goods received were federally protected when stolen, *Kirby v. United States,* 174 U.S. at 53 and 64; *Cohn v. United States* (2d Cir.), 258 Fed. at 358; *Souza v. United States* (9th Cir.), 304 Fed.(2d) at 276-277; other federal cases hold that such knowledge is not essential in a substantive receiving charge, but is essential in a conspiracy-to-receive charge, *United States v. Sherman* (2d Cir.), 171 Fed.(2d) at 623-624; *United States v. Crimmins* (2d Cir.), 123 Fed.(2d) at 272 and 273; and still other federal cases hold that such knowledge is not at all essential to prove either a substantive or conspiracy charge, *Loftus v. United States* (2d Cir.), 46 Fed.(2d) 841, 847; *Kasle v. United States* (6th Cir.), 233 Fed.(2d) 878, 882.

(2) In respect to the anti-reasonable doubt instruction, the decision of the court of appeals is in direct conflict with applicable decisions of this Court,

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[14]Containing standard Seventh Circuit instructions on receiving, and conspiracy to receive, stolen United States property, 18 U.S.C. Section 641.

and of other courts of appeals; and constitutes a sanction of a departure by a lower court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

(3) In respect to the postponement by the trial court of the probation hearing involving the co-defendant prosecution witness, and in respect to the deliberate disclosure by the prosecution of the guilty plea of such co-defendant prosecution witness, the court of appeals has decided an important question of law which has not been, but should be, settled by this Court.

STATUTES INVOLVED

This case involves 18 U.S.C. Section 641; 18 U.S.C. Section 371; the due process clause of the Fifth Amendment, United States Constitution; the jury trial and confrontation by witnesses clauses of the Sixth Amendment, United States Constitution; the jury clause, Article III, Section 2, United States Constitution. The pertinent provisions thereof are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner Willis K. Baker, Jr., a licensed commercial pilot[15] was engaged as owner and operator in the business of aerial forest firefighting (RT 823),

[15]Reporter's Transcript 822 (hereinafter called RT).

under direct contract with the United States Forest Service and the State of California. (RT 823-824). The business owned its own B-17, a Northrup F-15A Black Widow, a North American T-28, and a North American B-26, each costing from $35,000 to $40,000. (RT 826-827). His company employed 12 people, and was based at Fresno Airport where the company had a radio shack. (RT 827-828). Co-defendant Mervin Cornelsen was one of the employees. (RT 828).

On April 7, 1966, an indictment was filed in the United States District Court for the (now) Eastern Division District of California,[16] charging in Count I that between August through December 21, 1965, Baker and Cornelsen, as well as Roger Stephenson and Charles Rush, conspired:

> ". . . to commit an offense against the United States in violation of Title 18, Section 641, (sic),[17] to wit: the defendants did . . . conspire . . . to receive, to conceal, and retain, with intent to convert to their own use, and gain, and to dispose of a quantity of aircraft instruments and parts, radio receivers and transmitters and three ARN 21-units, property belonging to the United States Naval Air Station at Lemoore, California, as the defendants knew . . ." (CT 2-3).

In Count II, Rush alone was charged with theft of this United States property, therein alleged to be of more than $100 in value.[18] (CT 3).

---

[16]Clerk's Transcript 2-5, (hereinafter called CT).

[17]Actually, violation of 18 U.S.C. Section 371.

[18]18 U.S.C. Section 641.

In Count III, Baker alone was charged with receiving this stolen United States property, therein alleged to be more than $100 in value.[19]

On April 11, 1966, co-defendant Stephenson pleaded guilty to Count I, conspiracy to receive. (CT 6). The other defendants pleaded not guilty the same day. (CT 6). Jury trial was set for one month later, May 11, 1966; but Stephenson's probation hearing was continued past such trial date to May 23, 1966. (CT 6). On May 11, 1966, the trial date was continued to May 24, 1966. (CT 7). Thus on May 23, 1966, the day before the trial, Stephenson appeared for his probation hearing; at which time his probation hearing was continued on motion of Stephenson to June 6, 1966. (Docket, CT 150). Jury trial of Rush and of petitioners Baker and Cornelsen, commenced the next day, May 24, 1966. (CT 8).

(For the purposes of this petition it is assumed arguendo that the prosecution during the trial proved satisfactorily that Rush stole the United States property involved from Lemoore Naval Air Station.)

Stephenson was the chief prosecution witness, his testimony comprising some 210 pages of trial transcript (RT 384-427, 435-602), interspersed by testimony by his attorney Richard W. Nichols that Nichols had written a letter to the counsel for petitioners on March 4, 1966, stating:

> "I have been contacted by a representative of the United States Attorney's office and . . . a proposi-

[19] 18 U.S.C. Section 641.

tion has been made which Mr. Stephenson feels is to his benefit and which he desires to accept." (RT 428).

When called by the Government, the very first testimony of the probation-seeking Stephenson was:

"Q. Mr. Stephenson, are you the Roger Lee Stephenson who is named in the indictment in this case as a co-conspirator in Count One?

A. Yes, sir.

Q. And have you already entered a plea to that indictment?

A. Yes; I have.

Q. And what was your plea?

A. Guilty." (RT 384-385).

Counsel for both petitioners immediately objected:

"If Your Honor please, I submit that the questions asked and the answers elicited by prosecutor are misconduct. He has no right to ask any such questions at the outset of this witness' testimony . . ." (RT 385).

(Counsel for petitioners did move for mistrial while Stephenson was still on the stand, on the grounds that:

("A prior conviction or plea of guilty by a confederate is not admissible against an accused . . . Now that is what we have here . . . Therefore, Your Honor, I respectfully move the Court for a mistrial on that ground." (RT 421).

(The mistrial motion was denied. (RT 422).

(The mistrial motion was futile, for as soon as defense counsel heard the testimony and objected, the trial judge replied:

("THE COURT. Certainly the jury is entitled to have this information, so I see nothing wrong with it, counsel." (RT 385).)

Stephenson then testified that he received the equipment from Rush and sold and delivered it to Baker as surplus military equipment (RT 384-427); that Cornelsen was present at some of the conversations and received some of the items on behalf of Baker. (RT 384-427). Stephenson at first testified that he told Baker that the items were stolen (RT 446); but on cross-examination Stephenson admitted he had told counsel for petitioners on a prior occasion that Stephenson had not told Baker that this property was stolen (RT 472); that:

> "I would say, no, I didn't ever actually come out and tell them it was stolen . . . It was more assumed between all of us it was stolen property." (RT 572-573).

Another government witness, John Alvey, a former employee of Baker, testified he saw petitioners painting some radio equipment at Baker's Fresno airport radio shop; that he asked if the stuff was "hot" and they replied, "Everything was taken care of and don't sweat about it," and that the equipment was "warm". (RT 606-608; 660).

Petitioners both testified in their own behalf, denying they knew the property was stolen, or stolen from the United States. (RT 820-913; 914-975). Summarizing, they testified that the transactions were purchases of apparently legitimate surplus parts and equipment, at market prices, paid for by checks, and

used in the business of Baker or sold elsewhere in the course of business.

The Navy witness who established the theft of the items, Lt. Ericksen, testified that the material involved was not secret or classified, and nothing about the appearance of the units involved would indicate they were stolen. (RT 257; 271).

The Government argued to the jury:

> "I believe the judge will instruct you that it isn't even necessary that they know it's stolen Government property; all they have to know is that this property is stolen. All they have to know is that Mr. Stephenson does not have the property rightfully; where he got it or how he got it isn't important. . . ." (RT 1154).

Then the trial court instructed the jury:

> "It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property belonged to the United States and that the defendants knew it was stolen.
>
> "I'm not sure I read that correctly—It is not necessary that the Government prove that the defendants knew that the property belonged to the United States; it is only necessary to prove that the property did belong to the United States and that the defendants knew it was stolen." (RT 1283).

The trial court at the close of instructions told the jury:

> "There is nothing different in the way a jury is to consider the proof in a criminal case from that

in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense . . ." (RT 1286).

No objection to these instructions is shown in the record.

The jury deliberated from 10:55 A.M. to 4:30 P.M., with one hour for lunch, and returned their verdict finding all defendants guilty as charged. (RT 1289-1291; CT 124-125).

On July 5, 1966, motion for new trial was made on behalf of petitioners, the grounds of which included the points that:

"We urge that the court should not have permitted the defendant Stephenson to testify under the circumstances that existed in this case." (RT 1306).

"(W)e do feel that there was no substantial evidence of knowledge on the part of these defendants, that they knew the property was stolen . . ." (RT 1306-1307).

The same points were included in the notice of motion for new trial (CT 132-133), as was:

"The Court erred in charging the jury . . ." (CT 133).

Upon denial of motion for new trial, Baker was sentenced on July 5, 1966, to two years imprisonment and fined $10,000 on Count I, and two years imprisonment only in Count III, to run concurrently (CT 140); and Cornelsen that same day was sentenced to

two years imprisonment on Count I, the first six months to be served in a "jail-type institution" and execution of remaining 1½ years imprisonment suspended. (CT 138).

The thief Rush was given two years only, concurrently, on each of Counts I and II, with no fine. (CT 139).

Stephenson received probation for three years, with a $1,700 fine payable $50 per month. (Docket entry for June 6, 1966, on page following CT 150).

Petitioners filed their respective notices of appeal from their convictions on July 12, 1966. (CT 144, 146). In their Appellant's Opening Brief,[20] petitioners set forth the specific points that the trial court erred in denying the mistrial by reason of Stephenson's testimony re his guilty plea to the same indictment (Opening Brief 15); that the trial court erred in permitting Stephenson to testify over objection by appellants (Opening Brief); and that the anti-reasonable doubt instruction mentioned hereinbefore was plain error (Opening Brief, 22, 24-25).

The Ninth Circuit Court of Appeals affirmed the convictions of petitioners Baker and Cornelsen on April 4, 1968. (Volume I, Supreme Court Transcript of Record; Appendix A, E).

Petitioners duly filed their petition for rehearing May 3, 1968, again expressly urging the anti-reasonable doubt instruction (Rehearing petition 1), and also now urging specifically that it was plain error to

[20]Hereinafter called Opening Brief.

twice instruct the jury, and to allow the prosecution to argue, that it was not necessary for the Government to prove that the defendants knew that the stolen property belonged to the United States. (Rehearing petition 3). The Petition for Rehearing was ordered denied on May 21, 1968. (Volume I, Supreme Court Transcript of Record, Appendix B).

ARGUMENT

I. SINCE CONSPIRACY REQUIRES AN INTENT TO COMMIT AN OFFENSE "AGAINST THE UNITED STATES, OR TO DEFRAUD THE UNITED STATES", KNOWLEDGE THAT THE PROPERTY WAS STOLEN FROM THE UNITED STATES IS AN EXPRESS ELEMENT OF SUCH FEDERAL CRIME.

18 U.S.C. Section 371.

See the cases in accord, in the Rule 19 Statement portion of this petition.

II. SUCH KNOWLEDGE OF THEFT OF THE PROPERTY FROM THE UNITED STATES IS ESSENTIAL TO CONSTITUTE ANY FEDERAL MENS REA.

See *Nassif v. United States,* 370 Fed.(2d) 147, expressly voicing this view that, otherwise, there is nothing more than a state crime.

III. THE MORISSETTE AND KIRBY CASES HAVE NEVER BEEN OVERRULED AND SHOULD BE FOLLOWED, NOT IGNORED, BY THE LOWER FEDERAL COURTS.

Morissette v. United States, 342 U.S. 246; *Kirby v. United States,* 174 U.S. 47, 53, 64; and *Souza v.*

United States (9th Cir.), 304 Fed.(2d) 274, at 276-277:

> ". . . (W)e believe that the reasoning of the Supreme Court compels the conclusion that criminal intent is an essential element of the offenses . . ." (of selling United States property in violation of the 18 U.S.C. Section 641)

which case approved the following:

> ". . . the jury (was) instructed that . . . each sale or conveyance was made by appellant . . . with knowledge that the property had been stolen from the United States . . ."

IV. THE ANTI-REASONABLE DOUBT INSTRUCTION IN THIS CLOSE CASE WAS A DYNAMITE INSTRUCTION WHICH PREVENTED A FAIR TRIAL.

The proper reasonable doubt instruction is well-known. *Norwitt v. United States,* 195 Fed.(2d) 127, 134; *Williams v. United States,* 271 Fed.(2d) 703, 704; *Henderson v. United States,* 243 Fed.(2d) 681, 682; *Rose v. United States,* 149 Fed.(2d) 755, 759; *United States v. Belisle,* 107 Fed. Supp. 283, 285.

This anti-reasonable doubt instruction was the last instruction of any consequence in the case, and gave the jury exactly the wrong idea of the burden of proof required to convict.

V. THE MISINSTRUCTIONS IN THIS CASE DEPRIVED PETITIONERS OF THEIR RIGHT TO HAVE THE ISSUES OF SCIENTER AND REASONABLE DOUBT DECIDED BY A JURY, CONTRARY TO THE JURY TRIAL CLAUSES OF THE SIXTH AMENDMENT AND OF ARTICLE III, SECTION 2, UNITED STATES CONSTITUTION.

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, . . . for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach v. United States,* 326 U.S. 607, 615.

VI. SUCH GUILTY PLEA HAVING BEEN MADE WITHOUT ANY OPPORTUNITY TO PETITIONERS TO CROSS-EXAMINE IT AT THE TIME IT WAS MADE, SUCH EVIDENCE OF SUCH GUILTY PLEAS DEPRIVED PETITIONERS OF THEIR SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST THEM.

Kirby v. United States, 174 U.S. 47, recognized this long ago. The cases clearly rule this is reversible error. *Babb v. United States,* 218 Fed.(2d) 538; *United States v. Toner,* 173 Fed.(2d) 140; *United States v. Hall,* 178 Fed.(2d) 853.

In view of *Pickens v. Oliver* ..... U.S. ....., No. 1076, October Term, 1967, decided recently, allowing such evidence of the hearsay guilty plea at the trial of co-defendants violated the Sixth Amendment of the petitioners even when accompanied by a cautionary instruction not to consider it as evidence.

VII. THE POSTPONEMENT OF PROBATION DECISION IN RESPECT TO PROSECUTION WITNESS STEPHENSON RESULTED IN AN UNFAIR TRIAL, CONTRARY TO DUE PROCESS.

As the record shows, Stephenson was equivocal in his testimony and retreated readily on cross-examination from earlier testimony that he told petitioners the goods were stolen. Had there been no imagination or hope on his part that he might get probation, then his testimony would have been different. Since the trial could easily have been held after the probation ruling on Stephenson, which would have removed any inducement for Stephenson to "color" his testimony, the trial court should not have allowed the trial to precede the probation ruling.

Of course there are situations in which courts cannot postpone the trial. But where as here the trial court can easily make the trial fairer by rendering his ruling on probation prior to trial, the trial judge should do so; failure so to do violates self-evident fundamental standards of fair trial.

VIII. THE PLAIN ERROR RULE APPLIES IN THIS CASE IN THOSE RESPECTS WHERE THE RECORD WAS UNPROTECTED.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350; *Hormel v. Helvering,* 312 U.S. 552, 557; *Wiborg v. United States,* 163 U.S. 632, 658; *Crawford v. United States,* 212 U.S. 183; *Mahler v. Eby,* 264 U.S. 32, 45; *Brasfield v. United States,* 272 U.S. 448, 450.

SUMMARY

For the reasons given, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California,
June 18, 1968.

Respectfully submitted,
GEORGE T. DAVIS,
Attorney for Petitioners.

(Appendices A, B, C, D and E Follow)